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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GUY DEL GIUDICE, individually and on behalf of all those similarly situated, Plaintiff, -against- S.A.C. CAPITAL MANAGEMENT, LLC, et al., Defendants.	Case No. 2:06-CV-01413 (SRC) (MAS) Oral Argument Requested **Motion Date: June 16, 2008**

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PRELIMINARY STATEMENT

Rule 11 prohibits lawyers from copying complaints and filing them as their own without first conducting a reasonable inquiry into the allegations' factual basis. Yet three lawyers in this case have done exactly that, relying on Biovail Corporation, a plaintiff in New Jersey state court, both for their complaints' allegations and their purported "investigation." Indeed, Thomas Gentile, who filed the original complaint, did not even *see*—much less investigate—the 162-allegation, 65-page complaint he received from Biovail's counsel until the night before he filed it. And lead plaintiff's lead counsel and liaison counsel, William Federman and Evan Smith, respectively, have conceded that all but 15 of their amended complaint's 143 fact-allegation paragraphs are either "derived" or "taken" outright from Biovail's complaint. Under Third Circuit law, the Court need look no further for Rule 11 violations.

But there's more. From this action's very outset, Defendants BAS and its former analyst, David Maris, suspected that Gentile had simply copied and filed Biovail's state-court RICO complaint, repackaging it as a federal securities action against the same defendants. One of Biovail's own lawyers even reinforced that belief by testifying in a related proceeding that Gentile's complaint "looked like a copycat." Other witnesses later exposed that testimony as misleading, however, because *Biovail* had actually contrived this action to pressure the same defendants it had already sued in state court. To that end, Biovail had, among other things, (i) directed and paid its outside counsel to ghostwrite the *Del Giudice* complaint, (ii) located a willing shareholder to serve as class plaintiff, and (iii) enlisted Gentile, an ambitious lawyer trying to build a litigation practice at his new firm, to file the complaint.

Gentile was all too willing to oblige. Anxious to be part of such a high-profile litigation, he filed the complaint literally overnight: Biovail's counsel sent him a draft for the first time at 6:56 p.m. on March 23, 2006, and Gentile filed it the very next afternoon. Why the rush?

Gentile was not seeking emergency relief or racing a statute of limitations, but capitalizing on the publicity that would be generated that weekend when *60 Minutes* would air a segment with then-Biovail Chairman Eugene Melnyk. So Gentile filed the complaint without bothering to review any documents on which it was based, interview any witnesses to the conduct it alleged, or even meet his client personally. Given his complete failure to investigate any of the serious fraud allegations he would be filing against 21 defendants, Gentile not surprisingly made only minor changes to the entire 65-page complaint—adding his and Del Giudice's names and addresses and removing the reference to an "investigation" that he never conducted.

Worse, the allegations that Gentile improperly copied were themselves improper. In drafting them, Biovail had breached another federal court's protective order by using documents that BAS produced in another action. On January 26, 2007, District Judge Owen (then the judge in that other action) ordered Biovail to redact the tainted allegations—which also appear in the complaint here—and return the protected documents to BAS.

BAS notified lead plaintiff's lead counsel and liaison counsel here, Federman and Smith, respectively, of Judge Owen's ruling so they could amend their complaint accordingly. Undeterred, however, Federman and Smith filed a nearly identical complaint on January 31, 2007, that (i) retained all the allegations Gentile had initially (and wrongfully) copied, (ii) added irrelevant declarations from an unrelated case that Overstock.com had filed against one of the defendants (Gradient Analytics, Inc.), and (iii) bootstrapped some news stories about Biovail's improper complaint—not about the alleged events underlying it—as additional "support." After this Court ordered Federman and Smith on February 5, 2007, to demonstrate the sources for their allegations to ensure that they were not benefiting from Biovail's misconduct, they had to concede that they had either "derived" or "taken" all but 15 of their amended complaint's 143 fact-allegation paragraphs from Biovail's complaint.

Furthermore, not only did Federman and Smith copy Biovail's complaint, but they have also since admitted that they relied on Biovail's investigation of the "information originating from the Biovail Complaint." And they continue to rely on it, even though (i) Biovail itself has redacted any mention of BAS and Maris, and (ii) recent events strongly suggest that it was Biovail management, not securities analysts and hedge funds, that defrauded Biovail's shareholders. Biovail has, for example:

- released BAS and Maris from the New Jersey RICO claims (and all other claims based on the same documents) and paid their attorneys' fees;
- agreed to pay $138 million to settle the securities class action before Judge Owen and a similar securities action in Canada (including $83.1 million that the company rather than the insurers will pay). Those actions involve the same time period and transactions as Biovail's state-court RICO complaint, but allege that Biovail—not the Defendants here—was responsible for Biovail's stock-price drop;
- been charged (together with current and former senior executives) by the SEC and Canadian regulators with "chronic" securities-fraud violations during the same period that Biovail's RICO complaint covers. Those charges, like the securities class action, contradict Biovail's claim that the Defendants depressed Biovail's share price by criticizing the company's accounting and other actions;
- settled with the SEC, agreeing, among other things, to pay a $10 million penalty and conduct an independent examination of its accounting practices; and
- announced that the United States Attorney's Office in Boston has notified the company that it is a target of a criminal investigation into its P.L.A.C.E. program, which also is a subject of Biovail's RICO complaint.

Federman, Smith, and Gentile have all abdicated their Rule 11 responsibilities to this Court by failing to conduct any independent inquiry into the serious fraud allegations they have filed. Federman is no stranger to Rule 11, having been sanctioned more than $80,000 for filing other frivolous securities-fraud claims in 2003. Had he complied with the rule here, he would have realized that the entire action against BAS and Maris stemmed from Biovail's serial protective-order violations and financial fraud that the SEC has now exposed and that has rendered Biovail the target of a criminal investigation. Gentile has admitted that he would never have filed this action in the first place had he known, as he does now, the scope of Biovail's misconduct. Dismissing the complaint is the only result consistent with Gentile's admission and—more importantly—Rule 11 and Judge Owen's protective order. And Rule 11 and the PSLRA both dictate that Gentile, Federman, and Smith pay, as a sanction, BAS's and Maris's reasonable attorneys' fees and expenses incurred to defend this baseless action.

BACKGROUND

Judge Owen Orders a Hearing to Investigate Biovail's Breaches of His Protective Order

This case is the third of three actions involving Biovail's conduct and performance during the same time period. The first is a federal securities-fraud class action against Biovail that was formerly before Judge Richard Owen (and has since been reassigned to Judge Gerard Lynch) in the U.S. District Court for the Southern District of New York. On April 29, 2005, Biovail stipulated to a protective order in that court that bars it from using discovery for any purpose other than "the prosecution or defense of this Action."[1] Despite that unambiguous command, Biovail used documents that BAS produced to draft the second action, a New Jersey RICO suit against a BAS analyst, David Maris, and 21 others. Biovail filed that suit on February 22, 2006. Four weeks later, on March 24, Thomas Gentile filed the same allegations against the same defendants in this Court as a federal securities-fraud class action on behalf of Biovail's shareholders. All three actions involve the same transactions and time period, but contradictory liability theories: the New York securities plaintiffs allege that Biovail artificially *in*flated its stock price through market misrepresentations and accounting fraud, while Biovail and the plaintiffs in this action allege that Defendants artificially *de*flated Biovail's stock price by criticizing the same Biovail conduct and accounting practices.

---

[1] Protective Order ¶ 7, *In re Biovail Corp. Sec. Litig.*, No. 03 Civ. 8917 (S.D.N.Y. Apr. 29, 2005). The Protective Order is attached as Exhibit A to the supporting declaration of Brian M. English, Esq., dated May 22, 2008 ("English Decl.").

Biovail's RICO action, however, constituted a breach of Judge Owen's protective order. On January 26, 2007, he found that Biovail had willfully violated the order by using BAS's documents to draft its RICO claims. He therefore ordered Biovail, among other things, to redact its RICO complaint to eliminate allegations that impermissibly relied on such discovery.[2] After Judge Owen sent this Court a copy of his order, the Court responded on February 5, 2007, by directing lead plaintiff's lead counsel and liaison counsel, William Federman and Evan Smith, respectively, to "demonstrate that the source for [their complaint's] allegations was not tainted by a violation of Judge Owen's protective order in his Biovail case."[3] Instead, Federman and Smith merely responded on March 9, 2007, with a submission that cited Biovail's complaint as the source of 128 of their 143 paragraphs containing factual allegations.

Meanwhile, Biovail futilely attempted to sanitize its protective-order violation by issuing a subpoena in its New Jersey RICO action that sought the very documents Judge Owen had ordered it to return, and baldly asserted that this subpoena would "moot" the sanctions order.[4] When BAS alerted Judge Owen to this gambit, he held a nine-day evidentiary hearing about, among other things, (i) Biovail's and its attorneys' knowledge of the protective order, (ii) the New Jersey subpoena's basis, and (iii) whether the subpoena was intended to, as Biovail's counsel had maintained, "moot" the sanctions order. The New York proceedings probed the very issues that drew this Court's concern—how allegations purporting to quote BAS documents within Judge Owen's protective order came to appear in the securities-fraud complaint here.

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[2] Opinion & Order, *In re Biovail Corp. Sec. Litig.*, No. 03 Civ. 8917 (S.D.N.Y. Jan. 26, 2007) at 2 (English Decl., Ex. B).

[3] Transcript of Feb. 5, 2007 Hearing, at 18:18–24 (English Decl., Ex. C).

[4] Transcript of Jan. 31, 2007 Hearing, *Biovail Corp. v. S.A.C. Capital Mgmt., LLC*, No. ESX-L-1583-06 (N.J. Super. Ct.), at 18:12–17 (English Decl., Ex. D); Feb. 2, 2007 Letter from Marc E. Kasowitz to Bradley J. Butwin at 2 (English Decl., Ex. E); Transcript of Feb. 8, 2007 Hearing, at 22:18–21 (English Decl., Ex. F).

The Hearing Reveals That Biovail Orchestrated This Action While Gentile Rode Its Coattails

What the proceedings revealed was startling. From the outset of this action, BAS and Maris had believed that Gentile had simply copied Biovail's RICO complaint, added a federal securities claim, and filed it here.[5] Indeed, Biovail's lawyers on separate occasions all but stated that Biovail was an innocent bystander, when (i) Biovail counsel Marc Kasowitz listened silently during a February 8, 2007 teleconference as the Court inquired about the *Del Giudice* complaint's sources;[6] (ii) Biovail counsel Michael Bowe testified before Judge Owen that the *Del Giudice* complaint looked like a "copycat complaint. *They just took our complaint and filed it.*"[7]; and (iii) both Kasowitz and Bowe sat silently (along with Gentile, Smith, and the Federman firm's Stuart Emmons) as the relationship between the two actions was discussed at this Court's March 12, 2007 hearing on BAS's motion to stay discovery under SLUSA.

But that was far from the whole story. Witnesses before Judge Owen later revealed that *Biovail's own lawyers*—not Gentile—were the "cat" that copied the Biovail complaint.[8] And they did it at Biovail's request and expense.[9] In early March 2006, Biovail's New Jersey counsel, Bruce Nagel, had told Gentile to call Biovail's New York counsel, Albert Mishaan, after

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5 *See* BAS's Motion to Stay Discovery in *Biovail Corp. v. S.A.C. Capital Mgmt., LLC* Under the Securities Litigation Uniform Standards Act of 1998 at 4 (Docket No. 54-2).

6 Transcript of Feb. 8, 2007 Hearing, at 10:11–13:4 (English Decl., Ex. F).

7 Transcript of Feb. 27, 2007 Hearing in *In re Biovail Corp. Sec. Litig.*, No. 03 Civ. 8917 (S.D.N.Y.), at 152:14–16 (English Decl., Ex. G).

8 Transcript of March 20, 2007 Hearing in *In re Biovail Corp. Sec. Litig.*, No. 03 Civ. 8917 (S.D.N.Y.), at 466:14–23, 467:6–11 (English Decl., Ex. H).

9 *Id.* at 473:3–7.

Nagel learned that Biovail was looking to drum up separate shareholder litigation.[10] Gentile was eager to generate some business,[11] as he had joined the Lampf Lipkind firm to build a litigation practice "pretty much from scratch" and had not yet brought any clients to the firm.[12] So he called Mishaan soon after Nagel's referral. Mishaan sent him the complaint via e-mail at 6:56 p.m. on March 23, 2006, and referred him to Biovail shareholder Guy Del Giudice as "the name of a plaintiff who could be [Gentile's] client."[13] Gentile filed the complaint the very next afternoon without meeting his client, although he did get Del Giudice to sign and return the PSLRA-required certification early the next morning after sending him the 65-page, 21-defendant securities-fraud complaint.[14]

In the meantime, Gentile did not review any documents on which the complaint was based or interview any witnesses to the conduct it alleged, even though he had never before filed a securities class-action complaint and had no partners who practiced in that area.[15] And while Gentile said that he "considered" many issues, he ultimately conceded that he made only minor changes to the 65-page complaint that Biovail's lawyers supplied—adding his and Del Giudice's names and addresses and removing reference to an "investigation" that he never conducted:

> Q: Well, Mr. Gentile, other than adding your name and address and the name, address, and details of Mr. Del Giudice, and maybe one or two other changes, what else did you do to this complaint?
>
> A: I considered several issues.

---

10 Transcript of April 11, 2007 Hearing in *In re Biovail Corp. Sec. Litig.*, No. 03 Civ. 8917 (S.D.N.Y.), at 531:18–532:6 (English Decl., Ex. I).

11 *Id.* at 580:12–15.

12 *Id.* at 529:3–11, 531:2–4.

13 *Id.* at 610:20–611:22.

14 *Id.* at 534:15–21, 542:21–22, 576:8–19, 577:4–8, 610:22–611:8.

15 Transcript of April 11, 2007 Hearing in *In re Biovail Corp. Sec. Litig.*, No. 03 Civ. 8917 (S.D.N.Y.), at 530:3–9, 530:13–15, 532:14–16, 533:10–22 (English Decl., Ex. I).

> THE COURT: No, please.
>
> THE WITNESS: Yes, sir.
>
> THE COURT: The question is, what did you do, not what did you consider but what did you do. Did you do anything else to it?
>
> THE WITNESS: One thing that I remember specifically that I did is the statement that's listed on page 2, right above the preliminary statement. . . . And I stated that the complaint that I would file was based on information and belief on allegations from the publicly filed complaint in the New Jersey state court action. But that change was my doing.
>
> * * *
>
> Q: I just wanted to be clear, Mr. Gentile. Other than adding your name and address, adding Mr. Del Giudice's name and address, making that change, removing the reference to your having conducted an investigation, what else did you change in this complaint, in the draft that Mr. Mishaan sent you?
>
> A: I looked at the causes of action and I considered whether I needed to revise the causes of action. I did legal research on the question of whether a cause of action—
>
> THE COURT: Sir—
>
> THE WITNESS: Yes, sir.
>
> THE COURT: —the question to you was, what else did you change? Do you want to just go through and point out what you changed. That's what he's asking you.
>
> THE WITNESS: OK.
>
> A: To answer your question, sir, I don't recall any other changes that I made to the document, other than what you've already mentioned.[16]

Besides receiving both a client and a complaint from Biovail, Gentile also received a press release that he could use to tout the litigation.[17] In fact, free publicity seems to have been Gentile's primary motivation in filing the complaint when he did. He was not rushing to beat the statute of limitations or gain a tactical advantage, but to capitalize on the publicity campaign Biovail was about to unleash. For its part, Biovail was motivated to enlist Gentile's help so it could point to the supposedly "independent" shareholder suit to build credibility for its own action and public-relations blitz. Gentile was happy to oblige: he was "excited" about being part of a "newsworthy" matter and told Mishaan that he was "looking forward" to the *60 Minutes* story featuring then-Biovail Chairman Eugene Melnyk that he knew would air just two days later.[18]

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[16] *Id.* at 535:16–538:1.

[17] *Id.* at 580:22–581:13.

So Gentile filed the complaint without even seeing, much less reviewing, the documents the complaint purported to quote. According to Mishaan, only *after* Gentile filed the complaint did he "ask[] if [Mishaan] could send him copies of the documents that were referred to in the complaint."[19] On March 28, 2006, as Federal Express shipping slips reveal, Mishaan complied—sending Gentile binders containing 23 pounds of documents, including the subpoenaed BAS documents[20] that Judge Owen had ordered for use only in "the prosecution or defense of [the New York] Action."[21]

Despite his rush to file the complaint, Gentile ultimately declined to seek lead-plaintiff appointment. He claimed that it was a "very difficult," even "agonizing" decision for him because he had gone to such "great lengths to bring this matter into" his firm:[22]

> THE COURT: Can I ask you just for a brief rundown. You say you went to great lengths to get this case into the law firm. What were those great lengths?
>
> THE WITNESS: Oh, I'm talking about the fact, as we discussed, that we put in a late night in my law firm getting this ready—
>
> * * *
>
> THE COURT: I'm fixating on your use of the expression "great lengths to get the case."

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[18] *Id.* at 539:22–540:4, 540:13–19, 548:18–549:5.

[19] Transcript of March 20, 2007 Hearing in *In re Biovail Corp. Sec. Litig.*, No. 03 Civ. 8917 (S.D.N.Y.), at 482:17–22 (English Decl., Ex. H).

[20] *Id.* at 507:7–508:5.

[21] Protective Order, *In re Biovail Corp. Sec. Litig.*, No. 03 Civ. 8917 (S.D.N.Y. Apr. 29, 2005), ¶ 7 (English Decl., Ex. A).

[22] Transcript of April 11, 2007 Hearing in *In re Biovail Corp. Sec. Litig.*, No. 03 Civ. 8917 (S.D.N.Y.), at 607:1–11 (English Decl., Ex. I).

> THE WITNESS: Well, perhaps "great lengths" was not the right—
>
> THE COURT: Huh?
>
> THE WITNESS: Perhaps "great lengths" was not the right phrase to use. I had brought this case in with some eagerness. I wanted to take this case on. I wanted to be involved in high-profile, important litigation. And by not opposing the motion [for lead plaintiff], I was making a different decision. And that's why I agonized over making that decision. But I decided that that was the best decision for me to make.[23]

Federman and Smith File an Amended Complaint
That Also Copies Biovail's Allegations

Enter William Federman and Evan Smith, whom the Court appointed lead plaintiff's lead counsel and liaison counsel, respectively, on June 27, 2006. They continued Gentile's tradition of blind reliance on Biovail by filing an amended complaint a "substantial portion" of which—90% to be precise—was admittedly "derived" or "taken" outright from Biovail's complaint.[24] In fact, Biovail's complaint is the *only* source Federman and Smith identify for 88 of their paragraphs containing factual allegations.[25] Nor did Federman and Smith investigate the basis for Biovail's complaint, as they rely solely on the "investigation by Biovail and its counsel" save for some unidentified "public" sources and a few news stories.[26] And even those news stories were the products of Biovail's public-relations blitz (itself a violation of Judge Owen's protective order) and do nothing more than paraphrase the RICO complaint's allegations.

Importantly, Federman and Smith filed their amended complaint *after* BAS had notified them of Judge Owen's ruling that their source allegations violated his protective order.[27] On

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23 *Id.* at 608:3–8, 609:1–20.

24 *See, e.g.*, Plaintiff's Response to Court's February 27, 2007 Order at 3–4 & ¶¶ 2–14, 21–38, 51–58, 59–69 (Docket No. 88-1).

25 *See, e.g.*, *id.* ¶¶ 4–6, 51–58, 60, 66–68, 77–79, 80–83, 86–91.

26 April 25, 2007 Letter from Stuart Emmons to the Court at 2 (English Decl., Ex. K).

27 *See* January 30, 2007 Letter from Bradley J. Butwin to William B. Federman, Evan J. Smith, and Thomas A. Gentile at 2 (English Decl., Ex. M).

January 30, 2007, BAS asked them to withdraw the initial *Del Giudice* complaint that Gentile had filed because (i) its allegations, according to the complaint itself, were "based upon the facts set forth in the publicly filed complaint in *Biovail Corp. v. S.A.C.* [ESX-L-1583-06]" and not upon counsel's investigation as Rule 11 requires, and (ii) Judge Owen had held that Biovail's complaint was a "willful" and "obvious" breach of his order.[28] But Rule 11 did not deter Federman in 2003 (when his firm was ordered to pay more than $80,000 in attorneys' fees for filing frivolous securities-fraud claims), and it not deter him here. He and his liaison counsel Smith filed their amended complaint the next day. It includes the same improper allegations that Gentile originally received from Biovail—many of which *Biovail* itself later redacted because they violated the protective order,[29] and which the recent SEC charges undermine. Although the Federman firm concedes that their allegations against BAS and Maris "are potentially affected by the Protective Order" because they are based on documents "held by [Judge Owen] to have been used or disseminated in violation of the Protective Order," Federman and Smith have done nothing to cure that defect in this Court.[30]

Gentile Testifies That He Never Would Have Filed the Complaint Had He Known the Scope of Biovail's Misconduct

For his part, Gentile has admitted his role in the wrongdoing (even though he never brought it to this Court's attention). In testimony before Judge Owen, he acknowledged that the complaint he filed incorporated documents that were subject to a protective order that prohibited their use outside Judge Owen's court[31] and, further, that he had no right to file a complaint based on them:

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[28] *Id.*

[29] *Compare, e.g.*, Compl. & Jury Demand ¶ 119 (English Decl., Ex. N) *and* Redacted Compl. & Jury Demand ¶ 119, *Biovail Corp. v. S.A.C. Capital Mgmt., LLC*, No. ESX-L-1583-06 (N.J. Super. Ct.) (English Decl., Ex. O), *with* First Am. Class Action Compl. ¶ 129 (Dkt No. 48).

[30] April 25, 2007 Letter from Stuart Emmons to the Court at 2 (English Decl., Ex. K).

> THE WITNESS: There came a time when I came to the conclusion that the allegations, the complaint that I filed, were based on documents that were subject to the protective order, yes.
>
> THE COURT: And therefore you had no right to have used them.
>
> THE WITNESS: I subsequently learned that—
>
> THE COURT: OK.
>
> THE WITNESS: Yes, sir.[32]

If he had it to do over again, he would not have even filed the complaint:

> Q: Now, Mr. Gentile, had you known that the complaint you filed used documents in violation of a court order, would you have filed that complaint anyway?
>
> * * *
>
> A: Absolutely not. Had Shemmy Mishaan or anyone at the Kasowitz firm or anyone else brought to my attention that the allegations in the complaint that I was filing were premised on documents whose use was restricted by a confidentiality order, I would not have filed that complaint.[33]

But Gentile, Federman, and Smith all followed Biovail's lead, never bothering to investigate the propriety of its conduct or the basis for its allegations.

Biovail Fully Releases BAS and Maris and Settles Related Securities-Fraud Actions for $138 Million

Shortly after Judge Owen's hearing concluded, Biovail dropped its claims against BAS and Maris and paid their attorneys' fees in exchange for BAS's agreement not to seek further sanctions against Biovail from Judge Owen.[34] Biovail further agreed to release BAS and Maris

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31 Transcript of April 11, 2007 Hearing in *In re Biovail Corp. Sec. Litig.*, No. 03 Civ. 8917 (S.D.N.Y.), at 565:17–566:8 (English Decl., Ex. I).

32 *Id.* at 566:17–25.

33 *Id.* at 622:17–25.

34 Redacted Transcript of Sept. 10, 2007 Hearing in *In re Biovail Corp. Sec. Litig.*, No. 03 Civ. 8917 (S.D.N.Y.), at 2:20–3:10, 13:6–16, 15:13–16 (English Decl., Ex. P).

from all other claims that arose or could arise from the BAS documents governed by Judge Owen's protective order.[35] Soon after, Biovail agreed to pay $138 million ($83.1 million out of its own pocket) to settle the entire securities-fraud class action before Judge Owen and a similar action in Canada—the second largest securities-fraud settlement ever by a Canadian company.[36] Those cases involve the same time period and transactions as Biovail's New Jersey RICO complaint and, thus, this case. Significantly, however, their allegations that Biovail artificially *in*flated its stock price flatly contradict the RICO complaint's and this case's allegations, which accuse the Defendants of artificially *de*flating Biovail's stock price.

In approving the settlement with BAS—under which Biovail also agreed to redact from its RICO complaint all references to BAS and Maris—Judge Owen questioned why the *Del Giudice* action should be allowed to survive at all, since it contains the same allegations that its original author, Biovail, was now abandoning:

> THE COURT: . . . This is the case where the plaintiff or plaintiffs in that case, according to your intention, were "found somewhere" in order to make them plaintiffs in this case, and if it hadn't been for going out and being found somewhere by the Biovail people, according to you, that case never would have been filed at all?
>
> MR. SVIRSKY: Exactly right, your Honor. That is still our contention today.
>
> THE COURT: All right. Why should the case continue to exist at all?
>
> MR. SVIRSKY: It shouldn't. It shouldn't.
>
> THE COURT: I have no problem with even suggesting to you a dismissal of that case with leave to those parties to replead it consistent with Rule 11, if they want. But if you're correct about that, and if the other side does not basically dispute that, why does that case have a right to continued life?

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35 *See id.*

36 *See* Ontario Teachers' Pension Plan, "Teachers' Announces $138 Million Biovail Settlement" (Dec. 11, 2007), *available at* http://www.otpp.com/web/website.ntf/printview/biovail_settlement; Biovail Corp. Form 20-F, at 50 (filed Mar. 17, 2008) (relevant portions excerpted); Biovail Corp., "Biovail Settles Canadian Securities Class-Action Litigation" (Apr. 23, 2008), *available at* http://www.biovail.com/english/Investor%20Relations/Latest%20News/default.asp?s=1&state=showrelease&releaseid=1133790 (together, English Decl., Ex. Q).

> MR. SVIRSKY: We agree that that case has no right to exist. It should not have been filed in the first place. We think that may be a matter for the federal judge in New Jersey to handle, Judge Chesler. We will ask him very soon to do exactly what your Honor's suggesting.
>
> THE COURT: Let's not draw any road maps yet, but those are thoughts that occur to me along the way. If nobody is disputing that the case should not have been commenced in the first place with the documentary backup that it had, that it should not have been used, it seems to me it has no right to exist now. Then the only question is: Who has the right to blow the whistle on it?[37]

This Court does.

The SEC and Canadian Regulators Charge Biovail with Securities Fraud Based on Conduct Also Alleged in Biovail's and Del Giudice's Complaints

Securities regulators in two countries have now found that Biovail manipulated its financial statements in ways Maris and other analysts suspected in 2003. On March 24, 2008, the SEC and Canadian regulators separately charged Biovail and its most senior current and former executives with numerous securities-fraud violations arising from a wide-ranging scheme to deceive investors and analysts about the company's poor performance:

> Obsessed with meeting quarterly and annual earnings guidance, Biovail's executives repeatedly overstated earnings and hid losses in order to deceive investors and create the appearance of achieving that goal. And, when it ultimately became impossible to continue to conceal the Company's poor performance, Biovail actively misled investors and analysts as to its cause. This corrupt strategy was employed by Biovail's most senior officers.[38]

The SEC describes a pattern of "chronic fraudulent conduct—including financial reporting fraud and other intentional public misrepresentations" that affected the 2001–2003 reporting periods, such as false statements about the effect on earnings of an October 2003 truck accident involving a shipment of Biovail's product.[39]

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[37] Transcript of Sept. 10, 2007 Hearing in *In re Biovail Corp. Sec. Litig.*, No. 03 Civ. 8917 (S.D.N.Y.), at 6:25–8:3 (English Decl., Ex. P).

[38] *SEC v. Biovail Corp. et al.*, 08 Civ. 02979 (LAK) (S.D.N.Y.) ("*SEC Complaint*") ¶ 1 (English Decl., Ex. R).

[39] *Id.*

These SEC charges are contrary to essential allegations in Biovail's RICO complaint. An example of the obvious contradiction concerns two of Defendant Maris's October 2003 research reports. Biovail attacks those reports as untruthful because they opined—contrary to Biovail's public statements—that the October 2003 truck accident did not significantly impact the company's third-quarter earnings.[40] But according to the SEC, it was *Biovail* that made false statements about that truck accident with the intent to mislead analysts and investors:

> [I]n October 2003, Biovail intentionally and falsely attributed nearly half of its failure to meet its third quarter 2003 earnings guidance to a truck accident involving a shipment of Biovail's product, Wellbutrin XL. Biovail intentionally misstated both the effect of the accident on Biovail's third quarter earnings as well as the value of the product involved in the truck accident. The accident, in fact, had no effect on third quarter earnings. . . . The truck accident misstatements were intended to and did mislead analysts and the investing public concerning the significance of Biovail's failure to meet its own earnings guidance.[41]

Further examples of the overlap—and contradiction—between Biovail's and plaintiffs' allegations here and the SEC's allegations include:

***DEL GIUDICE V. S.A.C. CAPITAL MGMT., LLC*, NO. 2:06-CV-1413 (SRC) (MAS) (D.N.J.)**	***SEC V. BIOVAIL CORP.*, 08 CIV. 02979 (LAK) (S.D.N.Y.)**
"Central to the [Defendants'] scheme was the plan to use trumped-up *false and misleading criticisms of Biovail's accounting and business practices* to undermine investor confidence despite *strong business prospects* that the Defendants could not effectively assail." (¶¶ 93-94)	"This case involves chronic fraudulent conduct—including *financial reporting fraud* . . . . *Biovail's* executives repeatedly *overstated earnings and hid losses* in order to deceive investors . . . And, when it ultimately became impossible to continue to conceal the Company's *poor performance*, *Biovail* actively misled investors and analysts as to its cause." (¶ 1)
"In mid-January [2004], Maris, S.A.C., and the other Enterprise members . . . collaborated on getting Rocker Partners' media outlet TheStreet.com to issue an article again *questioning the circumstances surrounding the October 3, 2003 accident*." (¶ 146)	"Biovail [made] public statements declaring that the loss of revenue and income associated with the truck accident contributed significantly to Biovail's substantial revenue shortfall for the third quarter of 2003 . . . . *[Those] press releases and other repeated public statements were materially false and misleading. The truck accident had no impact on Biovail's financial results for the quarter* . . . ." (¶¶ 19-20)

[40] Biovail's Redacted RICO Complaint ¶¶ 109, 117 (English Decl., Ex. O).

[41] *SEC Complaint* ¶¶ 3, 4; *see also id.* ¶¶ 17–44 (English Decl., Ex. R).

"The [September 16, 2003 Camelback] report misrepresented . . . that Biovail had established a new entity to *inappropriately shift research and development costs off balance sheet* when, in fact, this entity was not an off-balance sheet entity but was a consolidated entity." (¶ 112)	"Biovail deliberately and fraudulently orchestrated the Pharmatech arrangement . . . to *fraudulently avoid recording on Biovail's books and records and reporting on its financial statements* the expenses and liabilities related to the *research and development* of certain Biovail products. . . ." (¶¶ 49, 52)
"In [his June 26, 2003] report, Maris knowingly and materially overstated *the difficulty Biovail would have receiving final approval* and asserted the [FDA] approvable letter . . . would likely result in a delay in the receipt of approval . . . ." (¶ 101)	"*When, by early June 2003, the FDA still had not yet approved Wellbutrin XL, Biovail executives became concerned* because it was clear that Biovail would not meet its second quarter earnings projects unless it sold Wellbutrin XL trade product by June 30." (¶ 88)

The SEC charges that these and other misrepresentations allowed Biovail to inflate its 2001–2003 earnings. In particular, the SEC concludes that Biovail employed three fraudulent accounting schemes to pull off the scam. First, Biovail improperly moved $47 million in R&D expenses (and $51 million in related liabilities) off its balance sheet relating to pharmaceutical products it was developing.[42] Second, it allegedly concocted a phony "bill-and-hold" transaction, through which it recorded approximately $8 million in revenue from a product order that it did not ship.[43] Third, the SEC charges that Biovail understated its foreign-exchange losses from transactions in Canadian dollars, allowing it to understate one quarter's net loss by 80%.[44]

These allegations and Biovail's RICO allegations are mutually exclusive. In other words, if (as the SEC charges) Biovail was artificially inflating its stock price during 2001–2003, then the Defendants could not have been artificially deflating the price during the same period. But rather than contest the SEC's charges (to be consistent with the RICO allegations), Biovail entered a consent decree under which it agreed, among other things, to (i) pay a $10 million penalty, (ii) disgorge ill-gotten gains, and (iii) allow an independent examination of its

42 *Id.* ¶¶ 2, 52–53, 60–61 (English Decl., Ex. R).

43 *Id.* ¶¶ 2, 95–96, 100–02, 105–06 (English Decl., Ex. R).

44 *Id.* ¶¶ 2, 126, 132, 136 (English Decl., Ex. R).

accounting practices.[45] Biovail also demoted Kenneth Howling, its Chief Financial Officer, and John Miszuk, its Vice-President, Controller and Assistant Corporate Secretary.[46] The same Biovail allegations that formed the basis for the SEC settlement are now before this Court because Gentile, Federman, and Smith copied and filed them here. And even though Biovail itself has waved the white flag to both the securities class-action plaintiffs and the SEC, Gentile, Federman, and Smith have refused to withdraw the allegations they copied.

ARGUMENT

THE *DEL GIUDICE* COMPLAINT SHOULD BE DISMISSED BECAUSE IT VIOLATES RULE 11.

A. Gentile, Federman, and Smith have each violated Rule 11 by copying and signing Biovail's complaint without conducting any inquiry into its factual allegations.

Federal Rule of Civil Procedure 11(b) forbids attorneys from filing a pleading unless they have personally determined that the pleading's factual allegations are well-founded: "By presenting to the court a pleading . . . —whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . . (3) the factual contentions have evidentiary support . . . ."[47] In other words, Rule 11 requires every attorney to "stop, think, investigate, and research" before filing a complaint.[48] This duty is personal and non-delegable; as the Supreme Court has held, a signing attorney cannot assign his Rule 11 obligations to another lawyer, even a lawyer in the same firm.[49]

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[45] *See* March 24, 2008 Biovail press release (English Decl., Ex. S); "SEC Charges Biovail Corporation and Senior Executives with Accounting Fraud," SEC Litig. Rel. 2008–50 (March 24, 2008) (English Decl., Ex. U). That press release also states that by entering into the consent decree Biovail does not admit the allegations in the SEC complaint.

[46] *Id.*

[47] Fed. R. Civ. P. 11(b); *see Garr v. U.S. Healthcare, Inc.*, 22 F.3d 1274, 1278 (3d Cir. 1994); *Bradgate Assoc., Inc. v. Fellows, Read & Assoc., Inc.*, 999 F.2d 745, 751 (3d Cir. 1993).

[48] *Martin v. Farmers First Bank*, 151 F.R.D. 44, 47 (E.D. Pa. 1993) (quoting *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 482 (3d Cir. 1987)).

Applying these principles to remarkably similar facts, the Third Circuit in *Garr v. U.S. Healthcare, Inc.* affirmed Rule 11 sanctions against two lawyers who had filed, without any investigation, a securities-fraud complaint that a first lawyer had already prepared and filed.[50] In that case, the second and third lawyers—like Gentile, Federman, and Smith here—changed nothing more than the plaintiffs' names and share-ownership figures before filing otherwise identical allegations.[51] Both lawyers claimed to have satisfied Rule 11 by evaluating the complaint based on their "experience" and "understanding," as well as a *Wall Street Journal* article that recounted the events described in one of the complaint's 26 paragraphs containing factual allegations.[52]

The district court held that the lawyers had abdicated their Rule 11 responsibilities. It dismissed the offending complaints and ordered the lawyers to pay *all* of the defendants' reasonable costs and attorneys' fees incurred to defend those complaints.[53] The second and third lawyers could not "piggyback" on the first lawyer's investigation, nor could they rely on the newspaper article "without some form of independent inquiry":

> In light of the Supreme Court's ruling in *Pavelic*, if the signing attorney cannot rely on the analysis of a trusted member of his law firm to have ascertained the facts, he certainly cannot rely *solely* on the analysis of a staff reporter for the *Wall Street Journal* to have done the same.[54]

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[49] *See Pavelic & LeFlore v. Marvel Entm't Group*, 493 U.S. 120, 125 (1989); *Greenfield v. U.S. Healthcare, Inc.*, 146 F.R.D. 118, 124 (E.D. Pa. 1993), *aff'd sub nom.*, *Garr*, 22 F.3d at 1281.

[50] *Garr*, 22 F.3d at 1276, 1280.

[51] *Id.* at 1276.

[52] *See id.*; *Greenfield*, 146 F.R.D. at 127 n.19.

[53] *See Greenfield*, 146 F.R.D. at 129.

[54] *Id.* at 127; *see also Garr*, 22 F.3d at 1280; *Forbes v. Eagleson*, 19 F. Supp. 2d 352, 375 (E.D.

The Third Circuit affirmed the district court in all respects, concluding that "the Rule 11 violation in this case is *so clear* that even on a *plenary review*, we would uphold the sanctions imposed" on the delinquent lawyers.[55]

1. Gentile filed the original *Del Giudice* complaint without investigating any of its factual allegations.

The violations here are even more apparent—and flagrant. Unlike the sanctioned lawyers in *Garr*, Gentile did not even copy, much less investigate, the complaint he filed. Biovail's counsel did it for him (at Biovail's request and on Biovail's dime) by forwarding Gentile the ready-made complaint, which he filed less than 24 hours later without (i) changing any substantive allegations, (ii) reviewing any documents on which the complaint was based, (iii) interviewing any witnesses to the conduct it alleged, or (iv) meeting his client (to whom Biovail had referred Gentile the night before). In fact, Gentile conceded that his only change to the complaint (other than adding his and his client's names) was to *remove* a reference to an "investigation" that he never conducted. Biovail sent Gentile the supporting documents only *after* Gentile had filed the complaint and his Rule 11 violation was complete.[56]

Because of his failure to investigate the complaint's basis, Gentile perpetuated in this Court the protective-order breach that Biovail had already committed by filing the same allegations in state court. And Gentile's post-hoc receipt of the documents Biovail sent him only compounded the violations, as the shipment itself violated Judge Owen's protective order. Gentile's Rule 11 violation was thus but one incident in a series of litigation abuses that

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Pa. 1998) ("Plaintiffs would have acted consistent with Rule 11 had they simply contacted sources cited by [the publications] to verify those articles' charges.").

[55] *Garr*, 22 F.3d at 1280 (emphasis added).

[56] *See Bradgate Assoc., Inc.*, 999 F.2d at 752; *Retired Chicago Police Ass'n v. Firemen's Annuity & Benefit Fund*, 145 F.3d 929, 936 (7th Cir. 1998) ("[Plaintiff's counsel's] violation of Rule 11 was complete when he signed and filed his complaint.").

dwarfs—in both quantity and magnitude—the mere failure to investigate in *Garr* that resulted in dismissal.

Gentile had no excuse for blindly filing the complaint so precipitously. He faced no time constraints (such as a statute of limitations) that might have mitigated his investigative duty—just his own desire to capitalize on the publicity campaign that Biovail was about to unleash.[57] Gentile's only reason for expedition was public relations and business promotion. He was "excited" about being part of a "newsworthy" matter that might help him generate business for his fledgling practice.[58] So he rushed to file this complaint before the *60 Minutes* story featuring Melnyk that he told Biovail's counsel he was "looking forward" to.[59]

Gentile also attempted to justify his haste by arguing that it improved his chances of being named lead counsel: "The idea is that if I filed the complaint quickly and that assisted me eventually in being appointed lead counsel, that would allow me to be in a position to make arguments to the court concerning class certifications."[60] Winning the race to the courthouse, however, has nothing to do with being appointed lead counsel, much less with class certification. Indeed, Congress enacted the Private Securities Litigation Reform Act of 1995 to stop precisely that tactic.[61] The statute's plain language does not even require lead-plaintiff candidates to file a complaint, much less allow courts to consider who filed first when choosing a lead plaintiff.[62] Even if it did, a lawyer's desire to "control the litigation," of course, does not "in any way detract from the reasonable inquiry otherwise required under Rule 11."[63]

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[57] *See Garr*, 22 F.3d at 1280 (observing that absence of time constraints underscored lawyers' failure to conduct reasonable inquiry); *Unioil, Inc. v. E.F. Hutton & Co., Inc.*, 809 F.2d 548, 557 (9th Cir. 1986) ("[T]here were no severe constraints of time or money that impeded [the lawyer's] inquiry.").

[58] Transcript of April 11, 2007 Hearing in *In re Biovail Corp. Sec. Litig.*, No. 03 Civ. 8917 (S.D.N.Y.), at 580:12–15 (English Decl., Ex. I).

[59] *Id.* at 539:22–540:4, 540:13–19, 548:18–549:5.

[60] Transcript of April 11, 2007 Hearing in *In re Biovail Corp. Sec. Litig.*, No. 03 Civ. 8917 (S.D.N.Y.) at 606:1–4 (English Decl., Ex. I).

[61] *See In re Lucent Tech., Inc. Sec. Litig.*, 194 F.R.D. 137, 145 (D.N.J. 2000) (observing that PSLRA "replaced the outdated practice of selecting representative plaintiffs by a 'race to the courthouse' "); S. Rep. No. 104–98, at 11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 689

The scope and severity of the complaint's allegations rendered Gentile's reasonable-inquiry obligations even more critical. This is no ordinary class-action complaint. Rather, it seeks "no less than *$4 billion* in compensatory damages"[64] against 21 defendants and at least 50 "John Doe" defendants. It even demands punitive damages,[65] which, if Gentile had read the statute, he would have realized are not recoverable in Section 10(b) litigation.[66] A lawyer threatening such massive liability has a heightened duty to conduct a reasonable inquiry:

> we consider it significant that the class allegations . . . threatened defendants with massive liability and foreseeably aroused a vigorous and costly defense. Just as the gravity of foreseeable injury is relevant to determining a person's standard of care in a negligence case, so should the cost of a foreseeable response by opposing parties be relevant to determining an attorney's standard of reasonable inquiry.[67]

Gentile showed little regard for that standard.

("The Committee believes that the selection of the lead plaintiff should rest on considerations other than a speedy filing of the complaint.").

62 *See* Securities Act of 1933 § 27(a)(3)(B), 15 U.S.C. § 78u-4(a)(3)(B).

63 *Garr*, 22 F.3d at 1280.

64 March 24, 2006 Class Action Compl. & Jury Demand ¶ 15 (emphasis added) (Docket No. 1).

65 *Id.*

66 *See* 15 U.S.C. § 78bb(a) ("[N]o person permitted to maintain a suit for damages under the provisions of this chapter shall recover . . . a total amount in excess of his actual damages on account of the act complained of."); *Straub v. Vaisman & Co., Inc.*, 540 F.2d 591, 599 (3d Cir. 1976).

67 *Unioil, Inc.*, 809 F.2d at 557.

2. Lead plaintiff's lead counsel and liaison counsel, Federman and Smith, blithely copied the *Biovail* complaint's factual allegations.

Federman and Smith have done nothing but follow in Gentile's footsteps. They filed the current, amended complaint on January 31, 2007, copying 133 of 145 fact-allegation paragraphs from Biovail's RICO complaint—right down to the repeated use of the word "enterprise" to describe the defendants.[68] Worse, Federman and Smith filed those allegations *after* they learned that Judge Owen had held that the same allegations (that Biovail filed) violated his protective order.[69] Gentile later admitted that had he known of that violation, as he does now, he never would have filed the Complaint here.[70] But such knowledge did not stop Federman and Smith.

After learning of Judge Owen's January 26, 2007 sanctions order, this Court responded on February 5, 2007, by directing Federman and Smith to "demonstrate that the source for [their complaint's] allegations was not tainted by a violation of Judge Owen's protective order."[71] "[P]leadings in a case in front of me," the Court later observed, "which are based upon a violation of a protective order issued by another judge are not likely to be considered by me in connection with a PSLRA motion."[72] Federman and Smith *cannot* show that their complaint is untainted, however, because they do not know the sources for their allegations—they merely copied Biovail's. In their response to the Court's February 5 directive, Federman and Smith conceded that all but 15 of their complaint's 143 paragraphs containing factual allegations were

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68 *Compare, e.g.*, March 24, 2006 Class Action Compl. & Jury Demand ¶¶ 51, 79, 80, 98 (Docket No. 1), *with* First Am. Class Action Compl. ¶¶ 50, 85, 95, 99 (Docket No. 48).

69 *See* January 30, 2007 Letter from Bradley J. Butwin to William B. Federman, Evan J. Smith, and Thomas A. Gentile at 2 (English Decl., Ex. M).

70 Transcript of April 11, 2007 Hearing in *In re Biovail Corp. Sec. Litig.*, No. 03 Civ. 8917 (S.D.N.Y.) at 622:17–25 (English Decl., Ex. I).

71 Transcript of Feb. 5, 2007 Hearing at 18:18–24 (English Decl., Ex. C); February 27, 2007 Order at 2 (Docket No. 69).

72 Transcript of Feb. 8, 2007 Hearing at 11:19–22 (English Decl., Ex. F).

either "derived" or "taken" outright from Biovail's complaint.[73] Even Biovail had redacted many of its tainted allegations by the time Federman and Smith filed their response, and Biovail has since abandoned its claims against BAS and Maris completely, giving them full releases. Federman and Smith, on the other hand, will never know how to cleanse their complaint because they relied on Biovail for the investigation that would have allowed them to identify the tainted allegations[74]—which is precisely what the Supreme Court, the Third Circuit, and numerous other courts have held violates Rule 11.[75]

Because they cannot dispute that they copied Biovail's allegations, Federman and Smith attempt to justify their complaint as the product of "public information."[76] They first assert that many of the copied allegations (which they lifted almost verbatim) have news-article support. Even if true, however, that coincidence does not excuse Federman and Smith's disregard for Rule 11. First, they neither identify the "news reports and articles"[77] on which they purportedly relied, nor do they distinguish between what the news reported and what Biovail merely alleged.[78] Second, the few articles Federman and Smith do cite at the end of their complaint do nothing more than describe the very complaint they copied[79]—bootstrapping that cannot substitute for the independent inquiry that Rule 11 requires. Third, even if the articles purported to state facts rather than merely summarize allegations, blind reliance on a news report does not discharge a lawyer's Rule 11 investigation obligation.[80]

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[73] *See, e.g.*, Plaintiff's Response to Court's February 27, 2007 Order ¶¶ 2–14, 21–26, 51–58 (Docket No. 88-1).

[74] *See* April 25, 2007 Letter from Stuart W. Emmons to the Court at 2 ("However, it is readily apparent that the Amended Complaint and the original *Del Giudice* complaint are well grounded in fact. The information originating from the Biovail complaint was developed through a lengthy and thorough investigation by *Biovail* and its counsel.") (emphasis added) (English Decl., Ex. K).

[75] *See, e.g.*, *Pavelic & LeFlore*, 493 U.S. at 125; *Garr*, 22 F.3d at 1280; *In re Kunstler*, 914 F.2d 505, 514 (4th Cir. 1990); *In re Connetics Corp. Sec. Litig.*, No. C 07–02940, 2008 WL 269467, at *6 (N.D. Cal. Jan. 29, 2008) (striking allegations under Rule 11 because plaintiffs' counsel "do not contend that they conducted independent investigation into the facts alleged in the [source] complaint or had any additional bases for the specific allegations"); *Schottenstein v. Schottenstein*, 230 F.R.D. 355, 361–62 (S.D.N.Y. 2005).

[76] *See, e.g.*, Plaintiff's Response to Court's February 27, 2007 Order at 7 (Docket No. 88-1).

[77] *See, e.g.*, *id.* ¶¶ 46–47.

[78] *See Geinko v. Padda*, No. 00 C 5070, 2002 WL 276236, at *6 (N.D. Ill. Feb. 27, 2002) ("The

Equally meritless is Federman and Smith's attempt to cloak themselves in the First Amendment, by arguing that Biovail's complaint is a "court filed document[] open to the public" that they were free to use.[81] The public's First Amendment right to access judicial documents is, of course, entirely separate from an attorney's Rule 11 obligation to investigate the factual basis for a lawsuit, and none of the cases that Federman and Smith cite holds differently. Rather, those cases merely (i) uphold the core constitutional principle that the public has the First Amendment right to inspect information in the public domain,[82] or (ii) affirm the media's or litigants'

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pervasive defect in the Amended Complaint in this case, however, is that it does not make clear what Plaintiffs directly allege as fact, and what Plaintiffs merely are asserting that someone else has alleged.").

79 *See* Plaintiff's Response to Court's February 27, 2007 Order ¶¶ 151 (describing Biovail complaint and its counsel's investigation), 152 (noting *60 Minutes* and *New York Times* coverage of Biovail complaint), 153 (quoting *New York Times* story about complaint), 154 (quoting *60 Minutes* story about complaint), 155 (noting *Wall Street Journal* article about defendant Gradient) & 156 (describing *Washington Post* story about Biovail complaint) (Docket No. 88-1).

80 *See Garr*, 22 F.3d at 1280–81; *Walker v. S.W.I.F.T. SCRL*, 517 F. Supp. 2d 801, 807, (E.D. Va. 2007) ("If Rule 11's requirement of a reasonable investigation is to be given its proper effect, courts must view with caution, and some skepticism, parties' claims to incorporate newspaper articles to fill gaps in a complaint's allegations.").

81 *See* Plaintiff's Response to Court's February 27, 2007 Order at 4 (Docket No. 88-1); April 25, 2007 Letter from Stuart W. Emmons to the Court at 2 (English Decl., Ex. K).

82 *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36–37 (1984) (holding that although protective order barred newspaper from disseminating information obtained through discovery, the First Amendment allowed the newspaper's publication of the same information obtained from other sources); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 105–06 (1979) (holding that newspaper that had lawfully obtained juvenile offender's name from court document could not be criminally sanctioned for publication of information); *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996) (permitting news magazine to publish discovery documents filed under seal but later released into public domain); *Nat'l Polymer Prod., Inc. v.*

longstanding common-law or statutory rights to access public information, whether contained in judicial filings or other documents.[83] Federman and Smith do not (and cannot) address the Third Circuit's controlling *Garr* decision, which is not alone in holding unequivocally that Rule 11 flatly prohibits copying and filing another complaint without reasonably investigating its factual basis.[84]

Borick-Warner Corp., 641 F.2d 418, 424 (6th Cir. 1981) (reversing permanent injunction barring corporation from disclosing in educational seminars information covered by protective order but made public during trial); *Doe v. State of Florida Judicial Qualifications Comm'n*, 748 F. Supp. 1520, 1529 (S.D. Fla. 1990) (holding that state commission could not bar attorney from disclosing in speeches and articles that he had filed discrimination complaint against judge); *Tavoulareas v. Washington Post Co.*, 111 F.R.D. 653, 660–61 (D.D.C. 1986) (granting newspaper's motion to unseal deposition transcripts and exhibits only for documents for which independent sources existed or that contained counsel's colloquy); *Minneapolis Star & Tribune Co. v. United States Dep't of Interior*, 623 F. Supp. 577, 578 (D. Minn. 1985) (denying on First Amendment grounds government agency's motion for protective order to bar newspaper's access to files under Freedom of Information Act).

83 *See Pansey v. Borough of Stroudsburg*, 23 F.3d 772, 791 (3d Cir. 1994) (granting newspapers' motion to intervene to obtain settlement agreement involving governmental entity, that would have been publicly available under state's freedom-of-information law); *Leucadia, Inc. v. Applied Extrusion Tech., Inc.*, 998 F.2d 157, 164 (3d Cir. 1993) (granting shareholder's motion to intervene in trade-secret suit between manufacturer and competitor to inspect documents filed under seal, where shareholder had filed federal securities class action against competitor, and citing "presumptive right of public access to pretrial motions of a nondiscovery nature"); *Littlejohn v. BIC Corp.*, 851 F.2d 673, 683 (3d Cir. 1988) (granting newspaper access to exhibits and deposition testimony read into evidence or included in official transcript before case was dismissed); *see also Scott v. United States Central Intelligence Agency*, 916 F. Supp. 42, 50 & n.8 (Fed. Cir. 1996) (conditioning plaintiff's access to family records under Freedom of Information Act on showing that information was in the public domain).

84 *See, e.g.*, *Connetics*, 2008 WL 269467, at *6 (striking allegations under Rule 11 because "there apparently were no 'investigative efforts' to combine with plaintiffs' reliance on the [source] complaint. . . . Instead, the [source] complaint appears to be *the only basis* for the allegations"); *Geinko*, 2002 WL 276236, at *6 & n.8 ("[I]f this Court were to accept Plaintiffs' view . . . two plaintiffs could file separate actions each relying on the allegations in the other's complaint and both would state a claim for fraud. Clearly, Rule 11's requirements do not allow this type of pleading loophole."); *Martin*, 151 F.R.D. at 48 ("[A] party who uses [model] pleadings is still subject to Rule 11's command to undertake a reasonable inquiry to ensure that the complaint is well grounded in fact and law. Rather than undertaking such an inquiry, Plaintiffs merely changed the caption of the [model] complaint, edited certain of the substantive allegations without altering their content, and filed the complaint with little regard for the merit of their claims.").

B. The *Del Giudice* complaint should be dismissed and BAS and Maris awarded their attorneys' fees and expenses incurred to defend the action.

To "deter repetition of the conduct," courts may address Rule 11 violations with both monetary and non-monetary sanctions, including dismissing the complaint and awarding attorneys' fees.[85] Indeed, the district court in *Greenfield* imposed both sanctions in addressing facts nearly identical to those here. It dismissed two complaints that lawyers had copied and filed without investigating the underlying facts, and awarded the defendants all the reasonable costs and attorneys' fees they had incurred to defend the actions.[86]

1. Dismissal is necessary to deter ongoing Rule 11 violations.

This Court should do the same. Only the complaint's dismissal will deter plaintiffs' counsel from continuing to ride Biovail's coattails as they have done throughout this action. First, Biovail sent Gentile a client (whom he did not meet), a complaint (which he filed the next afternoon), and 23 pounds of documents (*after* the complaint was filed and violating Judge Owen's protective order).[87] Then Federman and Smith filed a nearly identical complaint, even after Judge Owen had ruled that many of its allegations violated his order. Moreover, Federman and Smith will never be able to cure that violation in this Court because they never performed the investigation that would allow them to identify the tainted allegations. (And even if they had, their review of Biovail's documents would amount to yet another violation of Judge Owen's protective order.)

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[85] *See* Fed. R. Civ. P. 11(c)(4) ("A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct [and] may include nonmonetary directives; an order to pay a penalty into the court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation."); *Carlino v. Gloucester City High Sch.*, 57 F. Supp. 2d 1, 39 (D.N.J. 1999); *Kramer v. Tribe*, 156 F.R.D. 96, 101 (D.N.J. 1994) ("[A] district court has authority to dismiss an action 'for reasons of deterrence and punishment.' ") (quoting *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1179 n.15 (3d Cir. 1993)).

[86] *See Greenfield*, 146 F.R.D. at 129, *aff'd sub nom.*, *Garr*, 22 F.3d at 1279; *see also Connetics*, 2008 WL 269467, at *7 (striking allegations "taken directly" from another complaint "with no additional investigation"); *Geinko*, 2002 WL 276236, at *6 (refusing to consider allegations copied from other complaints).

[87] Transcript of April 11, 2007 Hearing in *In re Biovail Corp. Sec. Litig.*, No. 03 Civ. 8917 (S.D.N.Y.), at 534:15–21, 542:21–22, 564:9–20 (English Decl., Ex. I); Transcript of March 20, 2007 Hearing in *In re Biovail Corp. Sec. Litig.*, No. 03 Civ. 8917 (S.D.N.Y.), at 507:7–08:5 (English Decl., Ex. H).

The threat of ongoing Rule 11 violations is real because Federman, Smith, and Biovail have continued to act in concert. Specifically, as this Court has noted, they have united to assert a "common interest" privilege to resist discovery in Judge Owen's action.[88] Biovail's interest in that agreement is clear: it is exploiting this action—which it engineered from the beginning—to pressure the same defendants that it improperly sued in state court, and using this Court as its tool to circumvent Judge Owen's orders. There is thus every reason to believe that Gentile, Federman, and Smith's failure to investigate the Biovail complaint's allegations was not an isolated lapse in good judgment, but the start of a free ride on Biovail's vexatious litigation express, notwithstanding Rule 11's personal responsibilities.

Since then, even Biovail has apparently recognized the fatal flaws in its claims by waving the settlement white flag: it agreed (i) to pay BAS's and Maris's attorneys' fees, drop its claims against them, and release all other claims based on the same alleged conduct; and (ii) to settle the securities-fraud claims against it—which contradict the fraud theory in this action—for *$138 million*. Biovail also settled with the SEC numerous securities-fraud charges based, like the securities class action, on a fraud theory that contradicts the allegations here. Yet, despite masterminding this suit and even authoring the claims, Biovail maintains that it has no authority to release those claims.[89] So BAS suffers the unfair prejudice of being forced to defend claims that even their author has abandoned. Judge Owen noted the same unseemly prospect when he asked why this action should be allowed to survive at all.[90] It should not.

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[88] Transcript of February 27, 2007 Hearing in *In re Biovail Corp. Sec. Litig.*, No. 03 Civ. 8917 (S.D.N.Y.), at 154:7–13 (English Decl., Ex. G); Transcript of March 12, 2007 Hearing in *Del Giudice v. S.A.C. Capital Mgmt., LLC*, No. 2:06–CV–01413 (SRC) (D.N.J.), at 43:21–44:2 ("Secondly, there is, indeed, a common interest between the plaintiff in the state court action, Biovail, and the plaintiff class in this lawsuit given the existence of at least a tacit understanding by counsel that their interests coincide demonstrated by their indication that they would assert a joint or common interest privilege.") (English Decl., Ex. J).

2. Lead plaintiff's lead counsel, Federman & Sherwood, is a Rule 11 repeat offender.

Dismissal is also the only sanction that will deter Federman, a Rule 11 repeat offender. In 2003, his firm copied and filed securities claims—as he has done here—that "no competent attorney could have believed" were viable.[91] Federman also flouted defense counsel's warnings to that effect and later defiantly filed an amended complaint—as he has also done here—that contained even more frivolous claims.[92] Then, in responding to the defendants' motion to dismiss, the Federman firm made four frivolous arguments without even contesting that the alleged fraud was time-barred.[93] The court summarily dismissed 12 of the complaint's 13 claims and ordered more than $80,000 in sanctions against Federman's firm.[94] This firm should not be allowed to litigate yet another sanctionable complaint in federal court.

3. Plaintiffs' counsel should pay the reasonable attorneys' fees and expenses that BAS and Maris incurred to defend the sanctionable complaint.

The Court's sanction should also include the reasonable costs and attorneys' fees that BAS and Maris have been forced to spend defending an action whose very existence violates

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89 Redacted Transcript of Sept. 10, 2007 Hearing in *In re Biovail Corp. Sec. Litig.*, No. 03 Civ. 8917 (S.D.N.Y.), at 8:7–9:1 (English Decl., Ex. P).

90 *Id.* at 7:8–16.

91 *De La Fuente v. DCI Telecommunications, Inc.*, 259 F. Supp. 2d 250, 258 & 273 (S.D.N.Y. 2003) ("*De La Fuente* I").

92 *See id.* at 259.

93 *See id.* at 261–62, 270.

94 *See De La Fuente v. DCI Telecommunications, Inc.*, 269 F. Supp. 2d 229, 237 (S.D.N.Y. 2003) ("*De La Fuente* II"), *aff'd*, 82 Fed. Appx. 723 (2d Cir. 2003).

Rule 11.[95] Indeed, the PSLRA, which requires courts in securities cases to evaluate the parties' compliance with Rule 11, creates a *presumption* that the sanction should include *full* fees and expenses.[96] The delinquent attorneys can rebut that presumption only by proving that their violation was *de minimis* or that the sanctions "will impose an unreasonable burden . . . and would be unjust, and the failure to make such an award would not impose a greater burden on the party in whose favor sanctions are to be imposed."[97]

Gentile, Federman, and Smith can prove neither. Far from *de minimis,* Gentile's Rule 11 violations infected his entire complaint, as he failed to investigate a *single* factual allegation Biovail had given him to file. By his own admission,[98] he relied only on one of Biovail's attorneys, his own brief review of Biovail's allegations, and news articles about those same allegations—none of which discharged his Rule 11 duty.[99] Federman and Smith did no better. They concede that they copied and filed 128 of Biovail's 143 paragraphs containing factual allegations, and to this day, long after the Court ordered them to "demonstrate the source for all allegations set forth in the amended complaint,"[100] Federman and Smith cite the Biovail complaint 88 times without identifying *any* other specific sources to corroborate their allegations.[101]

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[95] *See Greenfield*, 146 F.R.D. at 129 (awarding "all reasonable costs and attorneys' fees incurred to date, or to the extent necessary hereafter," to defend two actions copied and filed without the reasonable investigation that Rule 11 required); *Martin*, 151 F.R.D. at 48–49 (same).

[96] *See Gurary v. Nu-Tech Bio-Med, Inc.*, 303 F.3d 212, 215 (2d Cir. 2002) ("The PSLRA further establishes a presumption that, 'for substantial failure of any complaint to comply with any requirement' of Rule 11(b), the award shall be the full amount of the reasonable attorneys' fees and costs.") (quoting 15 U.S.C. § 78u-4(c)(3)(A)).

[97] *See* 15 U.S.C. § 78u-4(c)(3)(B); *see also Gurary*, 303 F.3d at 223; *Weinraub v. Glen Rauch Sec., Inc.*, 419 F. Supp. 2d 507, 520–21 (S.D.N.Y. 2005) (requiring sanctioned attorney to submit "affidavit supported by personal financial records (including tax returns), financial records of his legal practice, and any other relevant evidence, to demonstrate that he cannot pay the full amount").

[98] *See* May 15, 2007 Letter from Thomas Gentile to the Court at 2 (English Decl., Ex. T).

[99] *See Garr*, 22 F.3d at 1276 (affirming Rule 11 sanctions against attorneys who relied on another attorney's factual investigation, their own review of the initial complaint, and a *Wall Street Journal* article).

CONCLUSION

Rule 11 imposes a personal obligation on every attorney to "look before leaping."[102] That includes a duty to conduct a reasonable investigation into a complaint's factual basis—a duty that Gentile, Federman, and Smith disregarded here. None of them ever probed the source of the allegations they copied. Instead, they freeloaded off Biovail's complaint and will likely continue to do so. And now Biovail—the sanctionable allegations' fountainhead—has withdrawn its identical claims against BAS and Maris and paid $148 million to settle securities-fraud allegations that contradict the allegations here. The Court should end Gentile, Federman, and Smith's abuse by dismissing a complaint that should not have been filed in the first place (and, if Gentile had another chance, would not have been filed) and sanctioning them in the amount of the reasonable attorneys' fees and expenses BAS and Maris have incurred to combat the three lawyers' Rule 11 violations.

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[100] February 27, 2007 Order at 2 (Docket No. 69).

[101] *See, e.g.*, Plaintiff's Response to Court's February 27, 2007 Order ¶¶ 4–6, 51–58 (Docket No. 88-1).

[102] *See Lieb v. Topstone Indus., Inc.*, 788 F.2d 151, 157 (3d Cir. 1986).

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